

A. Earl of Galloway
DECEMBER 16th, 1760.

Innerhouse

Unto the Right Honourable the Lords of Council and Session,

20th Decr 1760

do see

T H E

*22 Janry 1761. Adm'd to the
Last Intercourse*

P E T I T I O N

O F

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Alexander Earl of Galloway, and the o-
ther Trustees for the Creditors of the
deceased Captain John Stewart of
Phyfgill, Defenders;

Humbly sheweth,

T H A T by Contract of Marriage betwixt the said Captain
John Stewart, then John Colrain of Drummorel, and
Mrs. Christian Heron, Daughter of Patrick Heron of that
Ilk, the said Captain John Stewart, in Contempla-
tion of the Marriage, became bound to infest the said Mrs.
Christian Heron in a yearly Liferent Annuity of 600 Merks, to
be uplifted out of his Lands of Drummorel. And as he was
then presumptive Heir of Tailzie to Agnes Stewart, his Aunt,
in the Estate of Phyfgill, she being unmarried, and without
Possibility of Issue: It was further provided by the said Con-
tract, that in case he should, at any Time during the Marriage,
succeed to the Estate of Phyfgill, then, and in that Case, he
disburdens

8th June,
1728.

*Saturdays 3
papers*

disburdens and frees the Lands of *Drummorel* of the above Annuity of 600 Merks: And becomes bound and obliged to infeft his said Spouse, in an Liferent Annuity of 900 Merks, payable out of the Estate of *Phyfgill*, in case of Children of the Marriage, and 1200 Merks in the Event of no Children.

49th Oct.
1734.

That the said *John Stewart* did accordingly succeed to the Estate of *Phyfgill*, and made up his Title thereto by Service and Infeftment: And of this Date he granted a Bond of Provision, which recites his Contract of Marriage, and the Tailzie of the Estate of *Phyfgill*, made by *John Stewart* his Grandfather: Whereby the Heirs of Tailzie are allowed to provide their Wives in competent Liferents, not exceeding a fourth Part of the free Rent; and not by Infeftment of Annuity, so as the Fee of the Lands could be affected therewith: And that he was resolved to provide his Spouse in an additional Jointure out of the Lands of *Drummorel*, over and above the Liferent Provision of the fourth Part of the free Rent of the Barony of *Phyfgill*, his Intention being, that she should have an yearly Liferent of 1200 Merks, in case of Children existing at his Death, and 1500 Merks, in Case of none: And therefore he provides her to the fourth Part of the free Rent of the Barony of *Phyfgill*: And further obliges himself to infeft her in a yearly Liferent of the Sum of 500 Merks, upliftable out of *Drummorel*; at least, so much thereof as, with the fourth of the Rent of *Phyfgill*, might compleatly make up her Liferent Provision, to the Amount of the said Sums of 1200 or 1500 Merks, in the respective Events before mentioned.

That Mrs. *Stewart* was infeft both in the Lands of *Phyfgill* and *Drummorel*, in Terms of the above Bond of Provision: And Captain *Stewart*, her Husband, continued in the quiet and undisturbed Possession of the Estate of *Phyfgill* for several Years after: But *Agnes Stewart*, Grandchild of *John Stewart* of *Phyfgill*, by his Son *Robert*, brought a Reduction of the Tailzie made by her Grandfather, under which Captain *Stewart* had succeeded to the Estate, as being contrary to the Marriage



riage Contract betwixt her Grandfather and Grandmother, as far back as the Year 1668, whereby a small Part of the Lands, and the Conquest of the Marriage, was provided to the Heirs of the Marriage: And in this Process she prevailed, and was found entitled to the Estate of *Phyfgill*, as Heir of the Marriage, and Captain *Stewart's* Title to the Estate, founded upon the former Investitures, was accordingly reduced.

15th July.
1743.

That Captain *Stewart* was killed in the Battle of *Preston*; and after his Death Mrs. *Stewart*, his Relict, brought a Process against the Tenants of *Phyfgill*, upon her Liferent Infestment, which was opposed by *Agnes Stewart* now of *Phyfgill*, in respect that her Husband's Right had been reduced by the Decreet 1743: But the Cause having been reported to your Lordships, and thereafter heard in Presence, your Lordships found, " That the Obligation entered into by *John Coltrain* " of *Drummorel*, afterwards *John Stewart* of *Phyfgill*, in the " Marriage Settlement betwixt him and Mrs. *Christian Heron* " the Pursuer, whereby he was bound to settle upon her a " Liferent Provision, to the Extent of 50 *l. Sterling* yearly, " was onerous on the Part of the said *Christian Heron*, and rational on the Part of the said *John Coltrain*, alias *Stewart*: " And that he having implemented the same, by granting the " Liferent Infestment to that Extent, when he was in the " Right of Fee and Property of the Estate of *Phyfgill*, and " his Right subject to no Challenge, from any Thing that did " or could appear upon the Records, that Infestment was " likewise just and onerous, and does subsist in her Favours, " notwithstanding of the Reduction afterwards brought of the " Right and Title of the said *John Coltrain*, upon the latent " personal Obligation contained in the Contract of Marriage " entered into in anno 1668, betwixt *John Stewart* Writer in " *Edinburgh* and *Agnes Stewart* his Spouse, whereby he was " bound to settle the Estate he should acquire, in favour of " the Heir whatsoever of the Marriage: And notwithstanding the Decreet obtained in that Reduction, setting aside the

7th Feb.
1749.

“ the Right of the said *John Coltrain*, which the Lords found
 “ cannot hurt the said onerous Liferent Settlement made to
 “ *Christian Heron* the Pursuer, by her said Husband, while he
 “ stood in the full Right of Property of the Estate, conform
 “ to the Infeftments and Investitures thereof.”

This Decree was affirmed in the last Resort; and, in Consequence thereof, Mrs. *Stewart* has drawn her Liferent of 50 *l. Sterling* out of the Estate of *Phyfgill*, and the remaining 300 Merks out of her Husband's paternal Estate of *Drummorel*.

The Estate of *Drummorel* amounts only to 97 *l. 15 s. Sterling* yearly Rent; upon which Captain *Stewart* having contracted Debts above the Value of the Estate, executed a Disposition of the said Lands, in Favours of certain Trustees, with Power to them to sell the same for Payment of his Debts, which they have accordingly done, and the Price will not be sufficient for that Purpose.

That the said *Agnes Stewart* now of *Phyfgill*, and her Husband Mr. *Hawthorn*, brought an Action against Captain *Stewart*'s Children, and the Trustees for his Creditors, libelling upon the several Deeds and Decrees above recited, and subsuming, That the Defenders, as representing Captain *Stewart*, should be decerned and ordained to free and disburden the Pursuer's Lands of *Phyfgill* from Payment of the Relict's Annuity of 50 *l. Sterling*, contained in her Bond and Infeftment 1734, and to repeat to them so much of the said Annuities as have been paid since Captain *Stewart*'s Death, and to make Payment of the same in Time coming.

When this Process came in, Captain *Stewart*'s Children denied all Representation of their Father: So the only Question was with the Trustees, whose Duty it was to oppose this Action, as intended to carry off a great Part of the Fund, already too scrimp for Payment of the Creditors: And for them it was pleaded, That this small Liferent was lawfully imposed by Captain *Stewart* upon the Lands of *Phyfgill*: That he kept far within the Powers allowed him by his Grandfather's Tailzie,

zie, which was then the only apparent Settlement of the Estate: And as it had been already found a proper and effectual Security upon the Estate of *Phyfgill*, notwithstanding the after Reduction of Captain *Stewart's* Title to that Estate, there lyes no Action of Repetition against Captain *Stewart* or his Creditors on Account of that Liferent.

That Lord *Auchinleck* Ordinary took the Debate to Report, and appointed both Parties to give in Informations: And your Lordships of this Date, pronounced the following Interlocutor: “ On Report of the Lord *Auchinleck*, the Lords find the Pursuers entitled to Relief of the Annuity of 600 Merks, originally contracted to be paid out of the Estate of *Drummorel*, and thereafter transferred to the Estate of *Phyfgill*; but are not entitled to any Relief of the additional 300 Merks imposed on *Phyfgill* by the Contract of Marriage; and remit to the Lord Ordinary to proceed accordingly.”

4th Decem.
1760.

Your Lordships by this Interlocutor seemed to have intended to lay no greater Burden upon the Lands of *Drummorel*, than the Annuity of 600 Merks with which it was originally burdened by the Contract of Marriage: But as *Drummorel* at present stands charged with 300 Merks of the Lady's Annuity, your Lordships, by transferring 600 Merks from the Estate of *Phyfgill* upon *Drummorel*, do thereby burden this small Estate of *Drummorel* with 900 Merks of the Lady's Annuity, and leave only the remaining 300 Merks as a Burden upon the Estate of *Phyfgill*.

The Petitioners are not certain whether this was the Intention of the Court in pronouncing their Interlocutor in the above Terms; and therefore they hope they will be excused in submitting the Case and Interlocutor to your Lordships Review: And, for this Purpose, beg Leave to remind your Lordships, that old *John Stewart* of *Phyfgill* was undoubted Proprietor of that Estate, and by his Deed of Tailzie in the 1719, and the Titles thereupon expedited in the Person of *John Coltrain*, afterwards Captain *John Stewart* of *Phyfgill* his

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Grandson,

Grandson and Heir of Tailzie, the Fee of the Estate was vested in the said Captain *John Stewart* under the Limitations of the Entail: It is true, his Right was subject to Challenge, and was afterwards reduced upon a personal Obligation of his Grandfather in his Contract of Marriage 1668: But before this Reduction, Captain *John Stewart* was certainly Proprietor of the Estate, and therefore the Pursuer is under a Mistake, when she considers Captain *Stewart's* Title to this Estate, as only a *putative Title*, for, in Fact, it was the real and only Title of Fee and Property: He was the *verus dominus*, and the Estate was absolutely subject to his onerous Debts and Deeds: And so your Lordships expressly found in the Question betwixt his Widow and the now Pursuer; and the House of Peers affirmed your Decree.

If Captain *Stewart* had granted Infeftment upon the Estate of *Phyfgill* in Security of his own Debts, or of Money borrowed by him, the Creditors would have been secure: And the Petitioners may admit, that in this Case, the Pursuer would have had good Action against Captain *Stewart* and his proper Estate for relieving the Estate of *Phyfgill*, now found to belong to her, of such Incumberance; because in so far Captain *Stewart* would have profited in his private Estate and Patrimony, and the Pursuer lost in hers.

But this Reason does by no Means apply to the present Case: When Captain *Stewart* married Mrs. *Christian Heron*, he had a near and certain Prospect of succeeding to the Estate of *Phyfgill*; his Aunt, then past the Possibility of Issue, and to whom he was next Heir of Tailzie, was in Possession of the Estate. The certain Prospect of this Succession was, no Doubt, the Motive of *Heron's* giving his Daughter in Marriage to him. He accordingly succeeded in a few Years after to the Estate, and made up his Title as Heir of Entail. He was empowered by the Tailzie to provide his Widow in the fourth Part of the free Rent of the whole Estate; and accordingly, in Exercise of that Faculty, he granted her a Liferent

Liferent Infeftment of the fourth Part of the free Rents of the Eftate, and at the fame Time, granted Infeftment in his own proper Eftate, of an Annuity of 500 Merks, or fo much, as together with the fourth Part of the free Rent of *Phyfgill*, would make up a Liferent Provision to his Wife, of 1200 Merks, in cafe of Children, or 1500 Merks, in cafe of no Children.

This was a rational and onerous Act in him, as Proprietor of the Eftate: The Provision was no more than fuitable to the Eftate, of which he was not only the *bona fide* Poffeffor, but the *verus dominus* at the Time: But it was by no Means a Provision onerous, or fuitable to his proper Eftate of *Drummorel*: And therefore, tho' the Purfuer, who has now reduced the Title of Property which was in Captain *Stewart*, and thereupon made up a Title to the Eftate, has fuffered Damage or Loſs, by the Liferent Infeftment granted by Captain *Stewart*, while in the Fee of the Eftate: Yet Captain *Stewart* has not profited in his private Eftate *ex eo damno*. In fo far as he freed his own Eftate of a Jointure to his Wife, fuitable and adequate to the Circumftances of that Eftate, and for which his Eftate would have been liable to his Widow by Law, or by his Provision, he would juſtly be conſidered as a Profiter, and to that Extent, he would be obliged to relieve the Eftate of *Phyfgill*, upon the Principle already admitted; but to any greater Extent, he would not be bound in Relief, becauſe he was in no Shape *lucratus*, by eſtabliſhing the Jointure upon the Eftate of *Phyfgill*: And if his private Eftate ſhould be ſubjected to ſuch Relief, the Conſequence would be, that an Act, conſequential of what is moſt favoured in Law, his lawful Marriage, done by him in Implement of the natural Obligation ariſing from that State, under the Title and *bona fides* of Proprietor of the Eſtate of *Phyfgill*, and fuitable and onerous as to that Eſtate, would be converted into a real Loſs and Prejudice to his own ſeparate Patrimony, as to which, the Provision

vision was neither rational, nor onerous, nor meant to take Effect by any of the Parties.

If Captain *Stewart* had entered into no Contract with his Wife, and having afterwards succeeded to the Estate of *Phyfgill*, had died infest in the Fee, there seems to be no Doubt, upon the Principle established by the above Decision of this Court, and of the House of Peers, that she would have been entitled to her Terce of the Estate, subject to the Limitation of the Entail; and that her Right would not have been defeated by the after Reduction at this Pursuer's Instance; nor would the Pursuer have been entitled to any Relief of such Terce, against the proper Estate of Captain *Stewart*: The Estate of *Phyfgill* behoved to pass to this Pursuer *cum suo onere*.

As, therefore, Marriage was no unlawful Act in Captain *Stewart*, and by his Succession and Infestments in the Estate of *Phyfgill*, his Wife became entitled to her Terce, in case of his Decease: And as he could have no Apprehension of the Estate being evicted from him before his Death: And as her Terce even limited to a fourth Part of the free Rents, might, by the Improvement of the Estate, have exceeded the conventional Provision settled upon her by her Husband, that Provision may be justly considered as a rational Transaction betwixt him and his Wife, whereby she accepted of a Liferent Annuity, in lieu of her Terce: And if no Relief would have been competent to this Pursuer, against the proper Estate of Captain *Stewart*, for the Terce, no Relief ought to lie for the Liferent Annuity, granted in lieu of that Terce.

Again, suppose Captain *Stewart* had entered into no Contract with his Wife, and that after his Succession to the Estate of *Phyfgill*, he had granted a Liferent Provision to her, proceeding upon the Narrative of his Succession to *Phyfgill*, and that it was just and reasonable to provide his Wife suitably out of that Estate, but before her taking Infestment upon the Estate

state of *Phyfgill*, that Estate happened to be evicted from her Husband; in that Case the Petitioners cannot think, that the Wife of Captain *Stewart*, after his Death, would have had Action, for affecting the proper Estate of her Husband for the large Provision granted by him upon the Estate of *Phyfgill*, upon the Belief and Opinion of his Right of Property in that Estate, when that Provision was so much above what his own separate Estate could bear, or what he would have granted, having that Estate only in View: And if the Widow would not have had direct Action upon her Husband's Obligation against his proper Estate in the Case here supposed, the Petitioners cannot perceive the legal or equitable Foundation for the present consequential Action for relieving this Pursuer's Estate of the Effect of *John Coltrain's* Liferent Provision in Favours of his Wife.

In like Manner, suppose Captain *Stewart*, during his Right in the Estate of *Phyfgill*, had set long Tacks at the old Rent, in Terms of the Tailzie, and the Pursuer, after she prevailed in the Reduction, had found that she could get double Rent if the Tacks were open, there is no Doubt that the Tacks so set by Captain *Stewart*, and cloathed with Possession during the Subsistence of his Right, would have been effectual after the Reduction of his Right; whereby this Pursuer, by the Act of Captain *Stewart*, would have been deprived of Part of the Profits she might have reaped from the Estate, if no such Tacks had been granted. But yet it seems impossible to maintain, that she could involve Captain *Stewart* in Damages on account of a rational and lawful Act of Property, which he exercised at a Time while the Fee and Property of the Estate was vested in him, and from which no Advantage whatever accrued to him in his proper Estate.

In short, though the Petitioners admit that the Pursuer has suffered a Loss in her Estate by the Liferent Infeftment granted by Captain *Stewart* in Favours of his Wife; yet, as her Loss has brought no Profit to his private Estate, there can be

no Foundation for repairing the Pursuer's Loss or Damage out of the Estate of Captain *Stewart*.

The Doctrine of Relief competent to Heirs of Entail, against the Representatives of the preceeding Heir, who has contracted Debts, and given Securities therefore upon the tailed Estate, contrary to the Prohibitions of the Entail, is noways applicable to the present Case; because these Debts contracted by the Heir of Tailzie, have so far increased the private Estate of the Contractor; and consequently, what the subsequent Heir of Entail suffers in the entailed Estate, the Representatives of the preceeding Heir have gained in his separate Estate, to which they succeed.

And, in another View, the two Cases are noways parallel: For when an Heir of Entail contraveens the Prohibitions of the Tailzie, he is guilty of a *Wrong* against the succeeding Heir, and is bound in Law to repair that Wrong out of his proper Estate. But neither does this Principle apply to the present Case; because it cannot be maintained, that *John Coltrain* was guilty of any *wrong* or *tortious Act* by entering into Marriage, or by fulfilling the natural and legal Obligation arising from that State, by providing his Wife in a Liferent Provision after his Death, suitable and adequate to the Estate possessed by him *bona fide*, and as Proprietor at the Time. He could not foresee that the Estate was to be evicted from him: And as there was no Wrong in his Intention, and in the first Constitution of the Liferent Right in Favours of his Wife; so that Act could not afterwards become a Wrong, by the after Eviction of the Estate, so as to enable this Pursuer, the Successor in that Estate, to Reparation or Relief of that Burden, against the Representatives of *John Coltrain* in his separate Estate.

Upon the whole, the Petitioners cannot, with Submission, perceive any Principle of Law or Equity, upon which the Relief acclaimed by the Pursuer can be founded. The Annuity granted by Captain *Stewart*, was a legal Exercise of the
Fee

Fee or Property then vested in him : Your Lordships, and the House of Peers have sustained that Annuity as an effectual Charge upon that Estate. No Profit or Benefit arises to Captain *Stewart's* proper Estate from the Settlement of that Annuity. He has taken nothing out of the Estate of *Phyfgill* in virtue thereof, which he or his Representatives can be called upon to restore ; and therefore they cannot be liable in Damages, or to relieve the Pursuer from the Effect of this Burden.

It is no Answer to the Argument brought from the Case of the Terce, that, in the present Case, Captain *Stewart's* Title to the Estate of *Phyfgill* was reduced before his Death, and consequently before there was Place for the Terce ; for that was merely accidental, and no ways affects the Principle upon which the Argument is founded : And it is incumbent upon the Pursuer to show a substantial Difference betwixt the Liferent Provision arising to the Wife from the *Law*, and a rational Deed of the Husband, which appears to have been surrogated by him in Place of the legal Provision of the Wife, which is thereby excluded.

And indeed the whole of this Claim appears, with Submission, to be a Novelty, and without any Precedent in our Law. It often occurs, that the Right of a Possessor vested in the Fee of an Estate for the Time, will be reduced, as in this Case, upon a personal Obligation or Contract of his Predecessor unknown to him at the Time ; and yet Liferents, Tacks, and such other onerous Rights created by him, and made real and effectual upon the Estate, before the Reduction of his Right, will still subsist : And yet the Petitioners know no Instance, where an Action of Damages or Relief has been attempted or sustained by your Lordships in such Cases ; nor indeed can there be any Foundation for such Action, unless the Pursuer can qualify that the Possessor is profited by such Deeds in his separate Estate, and therefore ought to restore *quoad lucratus est ex alieno*.

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And in no Case can there be less Ground for stretching such a Claim, than in the present, where it can be proved, if necessary, that Captain *Stewart* laid out the whole of his Wife's Tocher, being 500 *l.* and further Sums which he borrowed, in the Improvement of this Estate; which not only proves Captain *Stewart*'s entire Confidence in his own Right, but also shows, that this Pursuer has no Reason to complain of the small Annuity settled by him upon his Lady, in lieu of her legal Provision, and now sustained by your Lordships, and the House of Peers, as an effectual Burden upon the Estate.

The Council for the Pursuer, in their Information, were pleased to deny, "That Captain *Stewart*, was a *bona fide* Possessor of this Estate; for that one Double of the Marriage Contract 1668, was found in the Charter Chest of the Family, and must be presumed to have been known to Captain *Stewart*; and consequently, he cannot be entitled to the Privilege of a *bona fide* Possessor, but must repair the Damage done to the Estate, by his wrongfully creating this Burden upon it, when he knew he had no just Title in the Estate."

These Allegations were all thrown out in the Process of Reduction, when the Pursuer insisted for Repetition of the Rents against the Captain, as a *mala fide* Possessor, but received Answers so satisfactory to your Lordships at that Time, as sufficiently acquitted the Captain of that Imputation, and of the Claim founded upon it.

For, *1mo*, it is not alledged, that the Captain had any Access to the Charter Chest of the Family, at the Time he entered into the Contract of Marriage 1728, which is the Foundation of the Decree, preferring the Relict to her Liferent.

2do, After he succeeded to the Estate, it is no necessary Consequence, that because he had Access to the Charter Chest, therefore he would be careful to peruse every old Paper

per that was lying in it, in order to discover, whether any Challenge might ly against his Title.

And 3^{tio}, If it were supposed, that the Captain had seen the Contract, before he granted the Infestment of Annuity to his Lady, of which there is not the smallest Evidence, yet the Petitioners cannot see that even this would establish such a *mala fides* against him, as would overturn the Defence above pleaded. If he had been as good a Lawyer, as he was a gallant Officer, he could not have perceived the Certainty of the Pursuer's Right, from that Contract of Marriage: Nay, if he had advised with Lawyers upon it, he would not have found them clear of Opinion, that the Tailzie 1719, would be reduced upon that Contract of Marriage.

The Petitioners do not mean to impeach the Justice of your Lordships Decree in that Reduction: There are Decisions of the Court quoted in the Information for the Petitioners, which might have afforded very just Ground of Doubt to any Lawyer of the Event of that Reduction; but it is sufficient to say, that the Title of the Pursuer, if it had been known to Captain Stewart, was by no Means so clear as to have put him in *mala fide* to grant that Annuity to his Wife upon the Estate of *Physgill*, which he had promised to her in his Marriage Contract, when the old Contract 1668 was unknown to him.

If this Branch of the Argument should appear to your Lordships material to the present Question, it is fully and accurately stated in the Information for the Petitioners; and tho' they cannot pretend in this Petition to have improved the Argument, which is there treated with great Ability, yet they flatter themselves that they have brought their Defence into such a Point of View, as will satisfy your Lordships, upon the Principles both of Law and Equity, that the Relief here acclaimed by the Pursuer, can extend no further than in so far as the Estate of *Drummorel* was relieved of any Part of the original Annuity provided to the Lady, and secured upon that Estate,

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by the Contract of Marriage 1728; and that your Lordships will find accordingly.

May it therefore please your Lordships to alter or explain your former Interlocutor; and to find, that as the Estate of Phylgill stands charged with a Liferent Annuity of 900 Merks to the Widow of Captain Stewart, sustained by your Lordships Decree, and affirmed by the Judgment of the House of Peers; so the Pursuer, the Heir of that Estate, is not intitled to have her Lands relieved of any more than 300 Merks of the above Annuity; which, added to the 300 Merks presently charged and payable out of the Estate of Drummo-rel, will make a Burden upon that Estate of 600 Merks a Year, being the Amount of the whole Annuity with which that Estate was charged by the Marriage Contract; by which the Lady's total Annuity of 1200 Merks will be equally divided upon these two Estates, tho' the one is more than triple the Value of the other.

According to Justice, &c.

THO. MILLER.